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No. 88-933

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

HEMMERT SHIPPING CORPORATION,
HEMMERT INTERNATIONAL CORPORATION,
AND TEXAS CHARTERING, INC.,

Petitioners,

v.

FURNESS WITHY (CHARTERING)
PANAMA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the common law of conversion should displace the uniform principle of admiralty law that shields a party, acting in good faith and with reasonable care, from claims for wrongful judicial attachment.

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v.

FURNESS WITHY (CHARTERING) PANAMA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of The Court Of Appeals for the Eleventh Circuit are reported at 854 F.2d 410 (*"Furness Withy II"*, Pet. App. A1-5[1]) and 772 F.2d 802 (*"Furness Withy I"*, Pet. App. A12-25).

[1] "Pet. App." refers to Petitioners' Appendix.

The memorandum opinions of the United States District Court for the Southern District of Alabama (Pet. App. A6-10 and A26-57) have not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1988. No petition for rehearing was sought. The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. 1254(1).[2]

RULE INVOLVED

Rule B(1) of the F.R.Civ.P., Supplemental Rules for Certain Admiralty and Maritime Claims, in effect at the commencement of the underlying actions on August 13-14, 1981 (Pet. App. A60) ("Rule B(1)").

STATEMENT OF THE CASE

By perceiving a conflict among the circuit courts of appeal, when no such conflict exists, Petitioners challenge firmly anchored admiralty precedent. Until now, a party proceeding in admiralty could not be held liable for reliance on judicial attachments unless he acted in bad faith, malice or with gross negligence. The

[2] Pursuant to the Court's Rule 28.1, Respondent certifies that its parent companies are Universal Marine Corporation, and The Tung Holdings Trust. Respondent has no subsidiaries.

issue posed by Petitioners' application is whether this uniform principle of admiralty law should be abrogated by application of a common law doctrine foreign to admiralty procedure. In recognition of " . . . the fundamental principle that maritime law throughout the country must be harmonious and uniform (Pet. 12)", the application of this common law doctrine should be rejected and the Petition denied.

The statement of facts and proceedings below presented by Petitioners is adopted herein, with the following corrections:

A. Statement Of Facts

As recounted by Petitioners, Hemmert Shipping Corporation, Hemmert International Corporation, and Texas Chartering, Inc. (collectively "Hemmert/Texas"), this proceeding arose due to repudiation by defendants below, World Energy Systems Associates, Inc. and WESA, Inc. (collectively "WESA"), of a maritime contract of affreightment with Respondent, Furness Withy (Chartering) Panama, Inc. ("Furness Withy"). Under this contract, WESA agreed to ship two cargoes of coal from the port of Mobile, Alabama, aboard vessels provided by Furness Withy (FF. 7[3]). In reliance on this contract, Furness Withy chartered the M/V CONTINENTAL CHARTERER to carry WESA's first shipment (FF. 8-9). When Furness Withy tendered this vessel to WESA on August 10, 1981,

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[3] The trial court's findings of fact will be designated as "FF".

WESA refused to perform (FF. 32). The reasons for WESA's refusal are inextricably tied to Hemmert/Texas; it is Hemmert/Texas who procured WESA's repudiation in exchange for financing WESA's cargo.

In early August WESA's principal, Dr. Paul Liu, approached Hemmert/Texas in search of interim financing for WESA's cargo (FF. 22-23). However, as a condition for this financing, Hemmert/Texas insisted that WESA must also charter a substitute vessel from them.

> WESA first sought short term financing. Hemmert and Texas proposed to provide a substitute vessel, purchase the . . . coal, load the coal aboard the substitute vessel, and negotiate [WESA's] letter of credit. Hemmert insisted that in order for his group to finance the deal, the coal would have to be shipped aboard their vessel and that they would hold title to the coal. Hemmert's proposal eventually became the basis of an agreement between WESA, Hemmert and Texas (FF. 23).

When Hemmert/Texas contracted with WESA, they knowingly assumed the risk that Furness Withy might enforce its preexisting contractual rights against WESA. *Furness Withy I* at 809 (Pet. App. A24). WESA sought to hedge this risk by chartering the substitute vessel from Hemmert/Texas "subject to cancelling" of the CONTINENTAL CHARTERER (i.e. conditioned on the CONTINENTAL CHARTERER failing to meet the August 10 cancellation date in Furness Withy's contract) (FF. 25). Hemmert/Texas refused. They would not provide cargo financing to WESA without a firm charter for their substitute vessel, the M/V EDCO (FF. 25).

Hemmert/Texas' principal, Klaus Hemmert, knew that WESA did not have sufficient cargo to load both the CONTINENTAL CHARTERER and the EDCO (Tr. 797[4]). Hemmert/Texas, therefore, insisted that WESA enter into a series of security agreements to protect their advances to WESA (*see* FF. 26-27). They further knew that, by taking assignments of WESA's letter of credit, WESA would be unable to pay the freight it owed to Furness Withy on the CONTINENTAL CHARTERER (Tr. 797). It is these arrangements which led Hemmert/Texas to assume the risk of WESA's liability to Furness Withy. *Furness Withy I* at 808. In short, Hemmert/Texas created their "superior strategic position" (Pet. 7) at Furness Withy's expense, and in anticipation that Furness Withy would invoke its remedies in admiralty against WESA.

After Furness Withy tendered the CONTINENTAL CHARTERER on time, WESA attempted to cancel its contract for the EDCO, but Hemmert/Texas refused (FF. 35). Left with no choice, WESA then repudiated its contract with Furness Withy. Furness Withy submitted its claims against WESA to arbitration and received awards in its favor, as confirmed by the district court, totalling $1,254,982.30 (R3. 100-01)[5]. However, after receipt of the security posted on WESA's behalf, Furness Withy still suffered a deficiency in excess of $500,000 on its judgment.

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[4] References to the trial transcript will be designated as "Tr.".

[5] The record in civ. no. 81-0571 will be designated as volumes R through R5; the record in civ. no. 81-0763 will be designated as volumes RR5 and RR6.

B. The Proceedings Below

As anticipated by Hemmert/Texas, Furness Withy responded to WESA's repudiation by invoking admiralty remedies. Actions were commenced in the Southern District of Alabama (civ. no. 81-0571) and the Northern District of Georgia (civ. no. 81-0763). In these actions Furness Withy sought, *inter alia*, attachments pursuant to Rule B(1) of WESA's interest in the cargo of coal and letter of credit. Furness Withy completed service of these attachments on August 13, 1981, prior to Hemmert/Texas' appearance in either action (FF. 44 and 47).

In seeking these attachments, the district court held:

> . . . *Furness Withy had every reason to believe that the coal was owned by WESA at the time the writs of attachment and garnishment were issued, and that Furness Withy acted in good faith* in seeking the issuance of the writs, and was not guilty of bad faith, malice or gross negligence [citing FF. 49] The court also finds that *Furness Withy did not fail to exercise reasonable care* in seeking issuance of the writs in question or in pursuing judicial remedies which resulted in the arrest and detention of the coal (emphasis added).

(Pet. App. A7). At the time it commenced these actions, Furness Withy reasonably believed, in light of Hemmert/Texas' failure to supply requested documents to the contrary, that WESA owned both the letter of credit and the cargo of coal. *Furness Withy I* at 808 fn. 9.[6]

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[6] Furness Withy has maintained to this day that WESA, and not Hemmert/Texas, owned the property attached and Hemmert/Texas' interest was merely that of a common law

(Continued on following page)

The district courts in both actions promptly gave Hemmert/Texas ample opportunity to prove their claims of ownership to the attached property. After hearing argument all morning on August 17, 1981, Chief Judge Charles A. Moye, Jr. entered an order the following day in civ. no. 81-0763 directing WESA to post $210,000 as security for Furness Withy's claims in return for lifting the attachment of WESA's letter of credit (RR5. 24). Thereafter, on October 1, Judge Moye ordered a transfer of civ. no. 81-0763 to the Southern District of Alabama pursuant to 28 U.S.C. § 1404(a) (RR6. 43).

During marathon hearings on August 14, 17, 18 and 19, 1981, in civ. no. 81-0571 Judge Virgil Pittman of the Southern District of Alabama heard and denied the numerous motions by Hemmert/Texas to vacate the attachment of the cargo of coal (R. 9, 16, 22, 26, 29, 30 and 32). Instead, Judge Pittman refused to lift the attachment unless WESA posted additional security of at least $380,000 for Furness Withy's claims (R. 22 and 29). In return, Judge Pittman directed Furness Withy to post counter-security in the amount of $800,000 for the specific counterclaims alleged by Hemmert/Texas, pursuant to Rule E(7) of the Admiralty Rules (R. 23).

By a stipulation and order dated August 21, 1981, all parties then agreed to the release of Furness Withy's

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(Continued from previous page)

pledge. While Hemmert/Texas' claim of conversion assumes their outright ownership of the coal, Furness Withy preserved its position in the court of appeals on this issue. Due, however, to the grounds for its holding, the court of appeals found it unnecessary to resolve this issue. *Furness Withy I* at 808.

attachment of the coal in exchange for WESA and Hemmert/Texas' agreement to post $390,000 from the proceeds of WESA's letter of credit as further security for Furness Withy's claims. (R. 36). This brought the total security obtained in both actions to $600,000. Pursuant to the terms of this agreement, WESA shipped the coal aboard the EDCO, Hemmert satisfied its liability to the EDCO's owners for the ocean freight and Furness Withy received the security posted on WESA's behalf after confirmation of its arbitration awards. However, as noted *supra*, the deficiency on Furness Withy's arbitration awards has never been satisfied.

The various claims asserted among Furness Withy, WESA and Hemmert/Texas then proceeded to trial in the Southern District of Alabama before Judge Emmett R. Cox. After trial was held between April 2 and 10, 1984, Judge Cox issued a memorandum opinion and directed entry of judgment on October 26, 1984, as follows:

1. Furness Withy received judgment against WESA in the amount of $1,061,155.90 plus costs totalling $16,927.50 and prejudgment interest as described therein;[7]

2. Hemmert/Texas received judgment against WESA in the amount of $962,829.52 plus prejudgment interest;

3. Hemmert/Texas received judgment against Furness Withy in the amount of $603,732.26, plus prejudgment interest, on the basis of the district court's construction that, notwithstanding the absence of any meritorious counterclaim by

[7] After including interest, the district court's judgment is consistent with the arbitrators' awards.

Hemmert/Texas against Furness Withy, Hemmert/Texas were entitled to restoration of the *status quo ante;* and

4. All other claims by Furness Withy, WESA and Hemmert/Texas were dismissed with prejudice. (R. 142).

Furness Withy appealed the entry of judgment in favor of Hemmert/Texas, as well as dismissal of its claims against Hemmert/Texas for their tortious interference with the contract between Furness Withy and WESA. On that appeal, (*Furness Withy I*), the Eleventh Circuit Court of Appeals:

1. affirmed dismissal of Furness Withy's claim against Hemmert/Texas for tortious interference with contract;

2. reversed the judgment in favor of Hemmert/Texas against Furness Withy on the ground that they did not prevail below on any of their counterclaims; and

3. remanded the action for reconsideration of Hemmert/Texas' claim for conversion.

In reversing the judgment in favor of Hemmert/Texas against Furness Withy, the court of appeals held that the district court erred in substituting Furness Withy's countersecurity bond for the attached property, stating:

> Furness Withy challenges this award of damages because [Hemmert/Texas] did not prevail on any of its counterclaims. This argument is meritorious. As pointed out earlier, the order which required Furness Withy to post the $800,000 provided that the bond would be released if Hemmert/Texas "do not prevail

> in their counterclaims." *See* Order of August 18, 1981, at 2. Since the district court found in favor of Furness Withy on [Hemmert/Texas'] counterclaim for wrongful attachment, the court had no authority under the terms of the order to distribute the proceeds of that bond to [Hemmert/Texas].
>
> * * *
>
> [Rule E(7)] contemplates, as did the court's order, that the defendant is entitled to the proceeds of the bond only if it prevails on its counterclaim. The district erred in holding that Furness Withy posted the bond as a substitute for the coal and letter of credit and incorrectly entered judgment in favor of [Hemmert/Texas] on the bond (emphasis added).

Furness Withy I at 808-09.

On that appeal, Hemmert/Texas attempted to sustain the district court's judgment by arguing, as they do on this Petition, that they posted WESA's security to avoid "overnight bankruptcy" (Pet. 9). In response to this argument, the court of appeals further held:

> [Hemmert/Texas] also argues that the damage award can be affirmed because it is entitled to be reimbursed by Furness Withy for the $600,000.00 that it posted to secure Furness Withy's claims against WESA. The problem with this position is that [Hemmert/Texas] agreed to post that bond in exchange for Furness Withy's agreement to release the attachments. It would be inequitable to now require the return of the $600,000.00 which was the basis for an agreement voluntarily entered into by [Hemmert/Texas] to assume WESA's liability for the breach of its original contract of affreightment. *Furthermore, an official of [Hemmert/Texas] knew when it contracted with Dr. Liu that it was assuming the risk that Furness Withy was going to meet the cancellation date. It is now too late to complain about the results of a voluntarily assumed risk* (emphasis added).

Furness Withy I at 809 (citing the testimony of Andy Hewes, one of Hemmert/Texas' principals, at the post attachment hearing held in Mobile on August 17, 1981).

In compliance with the remand, the district court then reconsidered Hemmert/Texas' claim for conversion and, in its memorandum opinion dated May 7, 1986, held:

> The counterclaim for the conversion of the coal can be described as a claim that there was a "judicial conversion." While the common law recognized such an action, *the rule in Admiralty is well established that in the absence of a showing of bad faith, malice or such negligence as amounts to bad faith, damages are not recoverable for the wrongful use of judicial process* (emphasis added).

(Pet. App. A10).

Hemmert/Texas appealed the district court's denial of their claim for "judicial conversion", as well as other claims which the district court found lay beyond the scope of the remand (Pet. App. A6-8, A10). In *Furness Withy II* the Eleventh Circuit Court of Appeals affirmed the district court's decision, stating:

> Hemmert points out that the cases involving wrongful attachment have not explicitly addressed the question whether the common law tort of conversion, which does not contain the element of bad faith, provides a remedy in the context presented here. Hemmert invites us to draw on the common law of conversion to award the damages it seeks. We decline the invitation. *In our view, maritime precedent has answered, albeit implicitly, the question of what a claimant must prove to recover for a conversion caused by an improper attachment. The claimant must prove bad faith*

by the party who obtained the attachment (emphasis added).

Furness Withy II at 412.

The matter now comes before the Court on Hemmert/Texas' Petition for Certiorari to the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

A. The Lower Courts Are Uniform In Holding That Bad Faith Is Required To Sustain A Cause Of Action In Admiralty For Wrongful Use Of Judicial Process

The decision by the court of appeals rests on 100 years of uniform admiralty precedent. *See Central Oil Co. v. M/V Lamma Forest*, 821 F.2d 48 (1st Cir. 1987); *Ocean Ship Supply, Ltd. v. M/V Leah*, 729 F.2d 971 (4th Cir. 1984); *Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 964 (5th Cir. 1984), *cert. denied* 471 U.S. 1117, 105 S.Ct. 2361, 86 L.Ed. 2d 261 (1985); *Stevens v. F/V Bonnie Doon*, 655 F.2d 206 (9th Cir. 1981); *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir. 1937); *John W. Stone Oil Distrib. Inc. v. M/V Miss Bern*, 663 F.Supp. 773, 778 (S.D. Ala. 1987); *Consolidated Rail Corp. v. M/T Hoegh Forum*, 630 F.Supp. 83 (E.D.Pa. 1985); *Applewhaite, et.al. v. S.S. Sunprincess*, 136 F.Supp. 769 (D.N.J. 1956); *Artinano v. Grace & Co.*, 286 F. 702 (E.D.Vir. 1923); *The Adolph*, 5 F. 114 (S.D.N.Y. 1880); and cases cited therein.

This rule applies to both arrests, *in rem*, pursuant to Rule C of the Supplemental Admiralty Rules, *see e.g. Central Oil Co. v. M/V Lamma-Forest* and *Ohio Ship Supply Ltd. v. M/V Leach, supra*, and attachments pursuant to Rule B(1) of the Supplemental Admiralty Rules, and its

precursors *see e.g. Furness Withy I* at 808; *Applewhaite v. S.S. Sunprincess, supra, Walsh Transp. Co. v. Iroquois Transit Corporation,* 16 F.2d 475 (S.D.N.Y. 1926).

By misconstruing the facts in both *Goodpasture, Inc. v. M/V Pollux,* 602 F.2d 84 (5th Cir. 1979), *cert denied,* 460 U.S. 1084, 103 S.Ct. 1775, 76 L.Ed 2d 347 (1983); and *Koch Fuels Inc. v. Cargo of 13,000 Barrels of No. 2 Fuel Oil,* 530 F. Supp. 1074 (E.D. Mo. 1981), *aff'd,* 704 F.2d 1038 (8th Cir. 1983), Hemmert/Texas contrive a conflict among the circuits that does not exist. Rather than concern the use of admiralty judicial process, the holdings in both of these cases address the carrier's exercise of an invalid possessory lien. Such remedies of self-help can not be equated with liability for use of judicial process.

In *Goodpasture,* the plaintiff, a domestic grain merchant, contracted to sell a shipment of grain to Empac, an exporter. Empac in turn contracted to sell the grain to Idema, a Colombian governmental entity. In order to transport the grain to Colombia, Empac chartered the M/V POLLUX from her owners, Negocios.

During loading of the cargo, Negocios became concerned about Empac's performance of its obligation to pay the vessel's charter hire. Accordingly, once in possession of the cargo, Negocios ordered the vessel's master to withhold the bill of lading from the shippers, Goodpasture. Negocios sought no order of any court, it merely asserted a possessory maritime lien on the cargo to force payment of the hire owed by Empac. On appeal, the court described Negocios' conduct, as follows:

> About 45 minutes after loading of M/V POLLUX was completed, Negocios notified Empac that Empac's

> authority to issue bills of lading was revoked and that only Negocios' agent or the master of the POLLUX could issue them. This was done in pursuance of the shipowner's plan to withhold issuance of such bills of lading until charter hire for the proposed voyage, plus the costs of bunkers, was paid in advance. *Id.* at 85.
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> * * *
>
> . . . POLLUX did not sail but *merely asserted a claim in the nature of a maritime lien against the wheat.* That claim was asserted with the intent to hold the wheat hostage against Empac's time charter arrears, and the record is clear that Negocios had no intention of releasing the wheat to Goodpasture or anyone else until the hire was paid. (emphasis added) *Id.* at 87.

Negocios extra-judicial seizure of Goodpasture's cargo led to the following issue:

> The question on this appeal, once seen, is simple and narrow: did the ship have a claim against Goodpasture to support the maritime lien it asserted against the ship's cargo of Goodpasture's wheat? From the answer to this inquiry all else follows, since if Negocios and POLLUX had no claim, they had no lien; and if they had no lien, *their assertion of a possessory right in Goodpasture's grain and their refusal either to carry or to release it was wrongful. And if wrongful, then Goodpasture had a claim against the vessel,* justifying the suit and attendant seizure of it. (emphasis added) *Id.* at 86.

Thus, Negocios relied merely on a remedy of self-help by asserting a possessory lien against Goodpasture's cargo. Negocios simply refused "to carry or to release" the cargo or issue a bill of lading to its owner, Goodpasture.

This non-judicial seizure by Negocios prompted Goodpasture's commencement of suit and arrest of the vessel *in rem*. Only then did Negocios turn to the court by filing a counterclaim against Goodpasture and attaching its cargo. However, Negocios' belated resort to judicial relief came too late to absolve its prior seizure without legal process. This much is acknowledged by Hemmert/ Texas:

> In *Goodpasture*, Negocios already *had* possession of the cargo at the time it asserted a maritime lien. *It had no need to resort to the courts initially, but did so after Goodpasture sued the vessel.* In the present case, [Furness Withy] did not have the cargo; it was in the possession of a third party, the barge carrier. *[Furness Withy] was therefore required to use judicial process to achieve its ends* (emphasis added in part).

(Pet. 15).

To make their argument, Hemmert and Texas confuse the exercise of a possessory maritime lien with a judicial attachment (Pet. 13-15). The court of appeals was not so misled:

> Hemmert cites *Goodpasture, Inc. v. M/V Pollux* [citation omitted] in support of its argument that, under the facts of this case, an action for conversion lies and that it need not prove bad faith to recover. *Goodpasture*, however is plainly inapposite. In that case, which involved an *in rem* proceeding, the Fifth Circuit held that a vessel became liable for conversion to the owner of a cargo of wheat when it left port without issuing the owner a bill of lading. *Goodpasture did not involve the conversion of property by*

> *wrongful attachment, the situation presented here* (emphasis added).

Furness Withy II at 412 fn. 6.[8]

The leading case for both the Fifth and Eleventh Circuits relied on by the court of appeals is *Frontera Fruit Co. Dowling, supra.* Hemmert/Texas cite no cases which distinguish or criticize *Frontera,* including *Goodpasture.* Other circuits continue to follow *Frontera* on this issue and ignore *Goodpasture* because *Goodpasture* does not concern the use of judicial process. *See e.g. Central Oil Co. v. M/V Lamma Forest* (1st Cir. 1987) and *Ocean Ship Supply, Ltd. v. M/V Leah* (4th Cir. 1984), *supra.* By the same token, *Goodpasture* makes no reference to *Frontera* and its progeny.

Hemmert/Texas' reliance on *Koch Fuels* also collapses under the same distinction. There, again, the carrier resorted to self-help by refusing to discharge the plaintiff's cargo of fuel oil whereupon the shipper commenced an action to recover its property. 704 F.2d at 1040-41. The carrier acted at its own risk without resort to judicial process and thereby exposed itself to liability for conversion.

A careful reading of both *Goodpasture* and *Koch* reveals the absence of any conflict among the circuits concerning liability for use of admiralty process.

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[8] Hemmert/Texas make much of the circuit court's inadvertent reference to the vessel sailing from port (Pet. 14). This error is harmless and without effect on the court's conclusion. Whether or not the vessel actually sailed away does not alter the carrier's liability for wrongfully refusing to issue a bill of lading or returning the plaintiff's property. It doesn't matter if this occurs alongside the dock or while at sea. The result is the same.

B. The Common Law Of Conversion, As Applied To Judicial Admiralty Attachments, Would Contravene And Is Therefore Preempted By Existing Admiralty Law

In seeking to apply the common law of conversion to judicial admiralty process, Hemmert/Texas overstep the boundaries painstakingly carved by this Court into the law of admiralty. It has long been the Court's policy to define " . . . the general maritime law, free from inappropriate common-law concepts." *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630, 79 S.Ct. 406, 409, 3 L.Ed. 2d 550 (1959). Although state law may be drawn upon to fill voids in the admiralty law,

> . . . state law may not be applied by a federal court if it would defeat or narrow any substantial admiralty rights of recovery, either as created by federal legislation or as defined by interpretative decisions of the federal courts. In addition state law may not be applied to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations. *Even if state law does not contravene an established principle of admiralty, it may be deemed pre-empted if it is in direct contravention of the uniformity of the admiralty law in some crucial respect* (emphasis added).

St. Hilaire Moye v. Henderson, 496 F.2d 973, 980 (8th Cir. 1974), citing *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Garrett v. Moore-McCormick Co. Inc.,* 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942); (additional citations omitted).

Other circuits applying this Court's guidelines are in accord. *Floyd v. Lykes Bros. Steamship Co., Inc.,* 844 F.2d 1044, 1047 (3rd Cir. 1988); *Byrd v. Byrd,* 657 F.2d 615, 617

(4th Cir. 1981) (state law will not be applied where its adoption might impair the uniformity and simplicity of admiralty law); *J. Ray McDermott & Co., Inc. v. The Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972)[9].

No aspect of admiralty procedure is more jealously guarded from the application of common law than maritime attachments. *See Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 773 F.2d 1529 (11th Cir. 1985), (rejecting a constitutional challenge under common law to the inherent power of the federal courts to issue maritime attachments without a preattachment hearing). " . . . admiralty is a separate body of substantive and procedural law, distinct from common law." *Id.* at 1535. *See also Maryland Tuna Corporation v. MS Benares*, 429 F.2d 307, 321 (2d Cir. 1970) (issues concerning the use of admiralty Rule B(1) are completely independent of state law); *Esso Standard (Switzerland) v. The Arosa Sun*, 184 F. Supp. 124, 127, 128 (S.D.N.Y. 1960) (questions concerning admiralty attachments are governed by admiralty law and no analogy can be drawn with state practice).

The introduction of common law conversion to the realm of judicial admiralty attachments would displace

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[9] This restriction is expressly recognized by one of the cornerstones of Hemmert/Texas' Petition. *Koch Fuels, supra*, at 1080. There the district court found no obstacle to the application of common law conversion in admiralty because the claim did not concern the use of admiralty judicial process. Having found no conflict with the admiralty law respecting liability for use of remedies of self-help, the district court felt free to adopt the common law. That is not the case now urged by Hemmert/Texas.

every precedent shielding a party acting in good faith from liability. According to Hemmert/Texas' logic, a good faith plaintiff not liable for a judicial attachment risks liability nonetheless for common law conversion of the *res* attached. There is no point, however, in immunizing the plaintiff from liability for a judicial attachment if it is still liable in conversion. The result is tantamount to liability for the attachment in admiralty without bad faith, malice or negligence. Surely, decisions such as *Goodpasture* and *Koch Oil* were not meant to neutralize the good faith plaintiff's protection under *Frontera*.

Decisions such as *Frontera* and *Goodpasture* work together by encouraging judicial remedies over self-help. The maritime plaintiff must act quickly against movable assets and the law arms him with a judicial process for doing so. *Schiffahartsgesellschaft Leonhardt, supra* at 1537 (time is of the essence in maritime attachment). *Frontera* requires only that he act in good faith. If a claimant resorts instead to self-help, he runs a substantial risk of strict liability for conversion under *Goodpasture*. Thus, a balance is struck between the plaintiff's need to move quickly and the defendant's right to due process of law.

Hemmert/Texas' efforts to apply the common law of conversion to admiralty judicial attachments upsets this balance. In doing so, they contradict uniform admiralty precedent which may not be disturbed by state or common law.

C. The Peculiar Facts Of This Unique Case Warrant Denial Of The Writ

The court of appeals aptly described the facts which triggered this action as an "unusual incident", the chartering of two oceangoing vessels for only one cargo. (Pet. App. A13). This freakish dilemma occurred due to Hemmert/Texas' calculated decision to charter a second vessel to WESA, knowing full well of WESA's preexisting commitment to Furness Withy. The unlikely possibility of anyone duplicating such folly does not deserve this Court's attention.

Hemmert/Texas have the temerity to argue that Furness Withy should shoulder all of the ensuing losses because it failed to adequately secure its contractual rights with WESA. (Pet. 24)[10]. Their complaint that Furness Withy failed to anticipate their meddling with its contractual position is unworthy of this Court's consideration.

As the court of appeals found, Hemmert/Texas' predicament is simply one of their own making. When they entered into their contract with WESA, Hemmert/Texas assumed the risks flowing from Furness Withy's enforcement of its contractual rights against WESA. *Furness*

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[10] To make their petition more interesting Hemmert/Texas misdescribe the nature of their conversion claim. As a result of the circuit court's decision in *Furness Withy I*, Hemmert/Texas can no longer claim reimbursement for the security they agreed to post on WESA's behalf. Rather, their claim is limited, at most, to " . . . the loss of use of its property for the period during which it was under attachment." *Furness Withy II* at 411. *See Furness Withy I* at 809 fn.12.

Withy I at 809. Hemmert/Texas cannot now take back with one hand what they voluntarily gave up with the other. Furness Withy fulfilled its part of the bargain by releasing the attachments and, as a result, suffered a $500,000 deficiency on the balance of its judgment against WESA. Hemmert/Texas' election to assume the risk of Furness Withy's claims and post security on WESA's behalf should not now be undone.

CONCLUSION

The lower courts have uniformly held for over a hundred years that a party cannot be liable for use of maritime judicial process unless it acts in bad faith, malice or with gross negligence. The availability of maritime judicial process to good faith plaintiffs acting with reasonable care is a fundamental underpinning of maritime commerce which preempts the common law of conversion. Nothing in the peculiar facts of this case warrant uprooting this time honored rule.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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